

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.463 of 2016

ORDER:

This civil revision petition is filed by the plaintiff assailing the orders dated 28.10.2015 of the learned Principal Junior Civil Judge, Khammam in IA.No.70 of 2015 in OS.No.139 of 2012 filed for appointment of an Advocate Commissioner to inspect the suit schedule property and to locate and demarcate the two sites in Sy.Nos.89/D and 88/B with the help of a qualified Surveyor or a Government surveyor and file a report with a sketch.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff at the stage of admission.

3. The learned counsel for the revision petitioner would submit that the trial Court had dismissed the application of the plaintiff mainly on the ground that in a suit for perpetual injunction a Commissioner cannot be appointed, but, the said finding is contrary to the judgment dated 17.04.2014 of this Court in C.R.P.No.3905 of 2013 and the three other decisions in **Mallikarjuna Srinivasa Gupta v. K. Sheshirekha**^[1]; **Varala Ramachandra Reddy v. Mekala Yadi Reddy**^[2]; and **Shaik Zareena Kasam v. Patan Sadab Khan and others**^[3]; and also a recent decision of this Court and that the necessity to file an application for appointment of Commissioner has arisen in view of fact that the defendants are disputing the identity of the property with a *mala fide* intention and that in the facts and circumstances of the case, the appointment of a Commissioner is absolutely necessary to protect the rights and interests of the plaintiff over the plaint schedule property and that earlier, the trial Court had dismissed the interlocutory application in IA.No.386 of 2012 filed for grant of temporary injunction and that in the dismissal orders passed in the appeal (CMA.No.7 of 2013) preferred against the orders in the said interlocutory application, liberty was given to the plaintiff to amend the

plaint and that in view of the liberty that was given while disposing of the CMA, an application for amendment of the plaint is already filed and that the said application in IA.No.83 of 2016 is pending before the trial Court and that in the facts and circumstances of the case, the revision petition is having acceptable merit and that the order impugned may be set aside and a Commissioner may be appointed for the purpose stated in the petition.

4. I have perused the material record including the order impugned.

5. Admittedly, the suit was instituted for a perpetual injunction. The stand of the defendants, who are resisting the suit, is that they had not encroached into any portion of the site of the plaintiff. Since the defendants had disputed the boundaries and the physical features of the property and had denied any encroachment said to have been made by them, the plaintiff had filed the above said Interlocutory Application seeking the aforementioned relief. However, the trial Court, by the order impugned, while dismissing the said application had recorded a finding *inter alia* that in a suit for perpetual injunction, it is for the plaintiff to prove her possession over the schedule property and that she cannot seek appointment of a Commissioner as it is the function of the Court to decide the issue as to who among the parties is in possession of the properties and the said judicial function cannot be delegated to an Advocate Commissioner. As rightly pointed out by the learned counsel for the revision petitioner, the answer to the question as to whether an Advocate Commissioner can be appointed in a suit for perpetual injunction depends upon the facts and circumstances of the particular case and it cannot be laid down as a Rule of Thumb that in no suit for perpetual injunction an Advocate commissioner can be appointed. Be that as it may, in the facts and circumstances of the case, the trial Court cannot be faulted for dismissing the application of the petitioner. In the CMA, liberty is already given to the revision petitioner/plaintiff to seek amendment of the plaint and accordingly an application is admittedly filed seeking amendment of plaint and for conversion of the suit for perpetual injunction into one for declaration. That application is pending consideration before the trial Court. In view of the said facts, this Court finds that this revision petition can be disposed of giving

liberty to the plaintiff to renew the application for appointment of a Commissioner for the purpose now sought for in the present application, in case the trial Court considers and allows the application for amendment of plaint, on merits. Such a course, in the well considered view of this Court, sub-serves the ends of justice.

6. The Civil Revision Petition is disposed of at the stage of admission giving liberty accordingly to the revision petitioner/plaintiff. In the facts and circumstances of the case, the trial Court shall dispose of the interlocutory application in IA.No.83 of 2016 filed for amendment of the plaint on merits and in accordance with the procedure established by law as expeditiously as possible and at any rate not later than a period of one (1) month from the date of the receipt of a copy of this order. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed.

M. SEETHARAMA MURTI, J

03.02.2016

Vjl

[\[1\]](#) 2006(3) ALD 362

[\[2\]](#) 2010(4) ALD 198

[\[3\]](#) 2011(4) ALD 231